Petition

Office - Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS,
CLERK

81-2024
RECORD NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

VIRGINIA CATHERINE WIESEN

Petitioner

V.

COMMONWEALTH OF VIRGINIA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

JOHN H. KENNETT, JR.
133 Kirk Avenue, SW
Roanoke, VA. 24011
(703) 345-0946

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does testimony by a deputy sheriff about statements in prior testimony of the accused compelled in another criminal proceeding on behalf of the same prosecuting attorney violate the constitutional privilege against self-incrimination.
2. Is testimony by a different deputy of a false account given by the accused as to her acquisition of a dog without proper warning constitutionally inadmissible.
3. Does a conviction based on insufficient evidence where guilt is scientifically impossible violate constitutional due process of law.

SUBJECT INDEX

	Page
I. Questions Presented	1
II. Names of Parties	2
III. Reference to Reports of Opinions	3
IV. Statement of Grounds to Invoke Jurisdiction	3
V. Constitutional and Statutory Provisions Involved	5
VI. Statement of the Case	6
VII. Argument	21
Point No. 1: The testimony by a deputy sheriff about statements in prior testimony of the accused compelled in another criminal proceeding on behalf of the same prosecuting attorney violated the constitutional privilege against self-incrimination	21
Point No. 2: The testimony of a different deputy of a false account given by the accused as to her acquisition of the dog without a proper warning was inadmissible.	25
Point No. 3: When evidence is insufficient to support a conviction, the conviction violates due process of law	28
VIII Conclusion	33

SUBJECT INDEX - CONTINUED

		Page
1X	Proof of Service	34
X	Appendix	35

TABLE OF AUTHORITIES

Constitution and Codes

	Page
Constitution of the United States	
Amendment V	6, 24, 27
Amendment Vl	28
Amendment XlV	3, 5, 24, 28, 33
United States Code	
28 U.S.C. § 1257(3)	5
Code of Virginia of 1950	
§18.2-97	6
18.2-119	23

Judicial Decisions

Escobedo v. Illinois 378 U.S. 478 (1964)	26
Griffin v. California 380 U.S. 609 (1965)	25
In Re: Winship 397 U.S. 358 (1970)	33
Lynch v. Commonwealth 131 Va. 762, 109 S.E. 427 (1921)	22
Malloy v. Hogan 378 U.S. 1 (1964)	24
Miller v. Harlese 153 Va. 228, 149 S.E. 619 (1929)	22
Miranda v. Arizona 384 U.S. 436 (1966)	24, 26
United States v. Wade 338 U.S. 218 (1967)	32

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGINIA CATHERINE WIESEN
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, VIRGINIA CATHERINE Wiesen, petitions for a writ of certiorari to review a judgment of the Supreme Court of Virginia as follows:

1. QUESTIONS PRESENTED

The questions presented by this petition are:

Does testimony by a deputy sheriff about statements in prior testimony of the

accused compelled in another criminal proceeding on behalf of the prosecuting attorney violate the constitutional prohibitions against self-incrimination, when the testimony by the deputy was part of the evidence in chief and not rebuttal testimony?

(2) Is testimony by a different deputy sheriff about a false account given by the accused as to her acquisition of a dog admissible when the accused was a suspect in the theft of a dog and no Miranda warning had been given when the testimony by the deputy was part of the evidence in chief and not rebuttal testimony?

(3) Does a conviction based on insufficient evidence violate the constitutional mandate of due process of law?

11. NAME OF PARTIES

The Petitioner is Virginia Catherine Wiesen, Route 1, Fincastle, Virginia, and the Respondent is the Commonwealth of

Virginia, c/o William L. Heartwell, Commonwealth's Attorney for Botetourt County, Botetourt County Courthouse, Fincastle, Virginia. If this petition is granted, counsel for the Respondent will be Gerald L. Baliles, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

111. REFERENCE TO REPORTS OF OPINIONS

A writ of error was denied by a judgment of the Supreme Court of Virginia on March 2, 1982 to a judgment of conviction by the Circuit Court of Botetourt County on April 10, 1981; and consequently no opinion was rendered or reported in an official or unofficial report.

1V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that the Petitioner was convicted by a state court of a crime when the evidence was inadmissible because it violated her rights guaranteed by Section 1 of Amend-

ment XlV of the Constitution of the United States of America; and

1. The judgment sought to be reviewed was made and entered by the Supreme Court of Virginia on March 2, 1982 denying a writ of error to a judgment of conviction by the Circuit Court of Botetourt County on April 10, 1982 convicting the Petitioner of theft of a dog; and

2. An order of the Supreme Court of Virginia was entered on March 30, 1982 staying its judgment on March 2, 1982 denying the writ of error as aforesaid in order to permit the Petitioner to have reasonable time and opportunity to apply to this Court for a writ of certiorari to review the aforesaid judgment of that court; the stay is effective until May 31, 1982, and if by that time, the case has been docketed in this Court, thereafter until final determination by this Court; and there has been no application for a re-

hearing to the Supreme Court of Virginia and its judgment on March 2, 1982 is a final adjudication by the highest court of the Commonwealth of Virginia concerning the subject matter in controversy; and

3. The statutory provision believed to confer jurisdiction on this Court to review the final judgment in question by a writ of certiorari is 28 U.S.C. § 1257 (3).

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision which this involves is the second sentence of Amendment XlV, Section 1, of the Constitution of the United States of America and is as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By judicial decision, the aforesaid due process clause of the Fourteenth Amendment makes the clause against self-incrimination of Amendment V of the Constitution of the United States applicable to State criminal proceedings, and is as follows:

> "... nor shall [the accused] be compelled in any criminal case to be a witness against himself..."

The criminal offense hereby involved is a conviction of theft of a dog under Va. Code § 18.2-97 which is as follows:

> "Any person who shall be guilty of larceny of a dog... shall be guilty of a Class 5 felony..."

V1. STATEMENT OF THE CASE

The following is a concise statement of the case confined to the questions presented. Page references to the transcript of the proceedings in the trial court on April 9, 1980 are preceded by the letter, number and hyphen "T.1-" ; and to the proceedings on

April 10, 1981 by "T.2-". The Petitioner is referred to as "Wiesen" or "Mrs. Wiesen" and the Respondent as "Virginia ".

After a preliminary hearing, Wiesen was indicted by a grand jury on October 6, 1980 for larceny of a dog [which had a value of $50.00 but is nevertheless a felony under a special statute]; and tried by petit jury in the Circuit Gourt of the County of Botetourt [hereby called "trial court"] on April 9 and April 10, 1981. In accordance with the jury verdict, she was found guilty and punished by fine of $1,000.00 and by confinement in jail for twelve months. Wiesen timely appealed to the Supreme Court of Virginia but her petition for a writ of error was denied and thus the appeal was not heard except for the proceedings seeking the writ. While there was no objections made by defense

counsel in the trial court involving the issues hereby involved, the three questions presented hereby were respectively points no. 5, no. 4 and no. 3 in the petition to the Supreme Court of Virginia for a writ of error.

Mrs. Ann Newcomb, who lives in the Cloverdale area of Botetourt County, Virginia, (T.1-1) owned an Irish Setter dog, mahoganey colored, which was born on May 4, 1979 (T.1-3) and which she purchased June 23, 1979 for $50.00 (T.1-2). On Friday, February 15, 1981 when the dog was eight months old, Mrs. Newcomb missed the dog and began looking for her in the neighborhood. (T.1-4) After looking over the weekend, she went on the following Monday, or February 18, 1980 to the home of Mr. and Mrs. Henry E. Wiesen (T.1-5). Mr. Wiesen answered the door, invited Mrs. Newcomb in the house, and gave her the dog. According

to Mr. Wiesen, the dog appeared on his patio on February 18, 1980 (T.1-177). Because the dog looked poorly, he gave it some water. Because it was in such poor health and he felt sorry for the dog, he offered to purchase it (T.1-178); but Mrs. Newcomb indicated she had a veterinarian (T.1-179) and Mr. Wiesen helped her place the dog in the car (T.1-7; T.1-23; T.1-179). Mrs. Newcomb then took her dog to her veterinarian to be spayed on the same day or February 18, 1980. Because the veterinarian told her the dog was in good health, on the following day, or on February 19, 1980, she called Mr. Wiesen, who had given her his telephone number in case she wished to sell the dog, to tell him all the things he said about the dog being in poor health were lies (T.1-26).

According to Mr. Wiesen, on the day after Mrs. Newcomb obtained the dog, or

on February 19, 1980, another Irish Setter appeared outside his house on the patio (T.1-180). Initially he thought Mrs. Newcomb's dog had returned (T.1-180) and he called the dog "Brandy", which was the name of the Newcomb dog. Since Mrs. Newcomb's telephone number was unlisted (T.1-181), he called Mrs. Thelma Hample in the neighborhood because she seemed to know all the gossip; and asked if Mrs. Newcomb's dog was again missing (T.1-181). Mr. and Mrs. Hample went to the Wiesen home on February 19, 1980, observed the dog and both testified at the trial the dog in the Wiesen home was not Mrs. Newcomb's dog. While Mr. and Mrs. Hample were at the Wiesen home with Mr. and Mrs. Wiesen and the second dog, all being present together at the same time, Mrs. Newcomb made the aforesaid call to Mr. Wiesen

and stated her dog was at the veterinarian (T.1-184); T.1-224; T.1-223). Consequently Mr. and Mrs. Wiesen testified they knew the dog which was then in their possession was not the Newcomb dog (T.1-184).

Mrs. Newcomb obtained her dog from the veterinarian on Thursday, February 21, 1980 (T.1-8) and kept the dog chained to her carport until the following Tuesday, February 26, 1980, when the dog was apparently stolen (T.1-8; T.1-11). Deputy Sheriff B. R. Kelly of Botetourt County Sheriff's Department went to Mrs. Newcomb's house on February 27, 1980 to investigate the dog theft. He immediately suspected Mrs. Wiesen (T.1-104). Mr. and Mrs. Wiesen then owned two separate homes in Botetourt County. One was located in the Cloverdale area near the home of Mrs. Newcomb

(T.1-104 & 105) and the other one was under construction located in the Mill Creek section, 7 miles north of Troutville (T.1-105). During the first week of March, 1980, Jamie Newcomb, daughter of Ann Newcomb, went to the Wiesen house and accused them of stealing her dog (T.1-74; T-185). Consequently Mr. and Mrs. Wiesen decided to tatoo a number on their identical looking and identical named female Irish Setter in order to avoid confusion of it with the apparently stolen dog of Mrs. Newcomb (T.1-186). Mr. Wiesen called his veterinarian and several other veterinarians in the Roanoke area, but was unable to find one who would tatoo the dog (T.1-186 & 187). As a result, Mrs. Wiesen made arrangements through a niece to have the dog tatooed in Winchester, Virginia. Because Mrs. Wiesen did not particularly

want a large dog (T.1-256a), she decided to give the dog to her niece, Carolyn Sink, in Winchester, who raised St. Bernards. Thus arrangements were made for the dog to be tatooed, the dog was tatooed April, 1980, but Mrs. Sinkdid not want the dog and it was brought back by Mrs. Wiesen to Botetourt County.

On June 17, 1980, Deputy Kelly with Mrs. Newcomb and Jamie Newcomb in his police car, observed the Wiesen's property in the Mill Creek section of the County from Interstate Highway 81. He saw Kent Bartley, son of Mrs. Wiesen, with an Irish Setter dog. He immediately drove from the interstate to the Wiesen property as Mr. Bartley was putting the dog in the garage and shut the door. The dog was not visible when they drove up (T.1-106). Kelly parked the car about fifty feet from the garage and

Mrs. Newcomb and Jamie stayed in the car. He asked Bartley if he could look at the dog and Bartley raised the garage door and let him look. He asked if Mrs. Newcomb and Jamie could look at the dog and Bartley would not permit it (T.1-107). Then Kelly left to obtain a search warrant. Mr. Wiesen testified that when Officer Kelly came to the house and stated he had two women in the car who wanted to feel the dog, he asked why they wanted ot feel the dog. He was afraid if they felt the dog they would some disfigurement and use it as identity for the dog . Consequently he wished for them to explain in advance what they were looking for before he permitted them to feel the dog. (T.-191). Nevertheless, both Mrs. Newcomb and Jamie testified unequivocally they identified the dog from the distant views (T.1-12; T.1-71 & 73).

When Deputy Kelly returned with the search warrant, he observed the dog and saw the tatoo number 227-60-7037 on the dog (T.123 & 124). With two other deputies, they went inside the Wiesen home and discussed the problem with Mr. Wiesen, Mrs. Wiesen and Bartley. Mr. Wiesen called Senator Emick, a lawyer form Fincastle, who then talked to Deputy Kelly. Mrs. Wiesen had no conversations with a lawyer. Instead she took Deputy Kelly to her Clover-dale home and showed identification of purchase from Carolyn Sink in Winchester. This account of the acquisition of the dog was false. Mr. Wiesen explained Mrs. Wiesen lied to Kelly because Kelly had threatened to take the dog to a pound until ownership could be determined. She was trying to protect the dog for the moment until the matter could be

determined in court (T.1-91). Within several days, Mr. Wiesen contacted Senator Emick to have him explain to the authorities the truth of the matter (T.1-198); and Mrs. Wiesen gave a similar explanation. (T.1-260 & 261).

On July 5, 1980, Jamie Newcomb saw an Irish Setter dog in a Wiesen vehicle going towards the Wiesen property in the Mill Creek section. Consequently Mrs. Newcomb and her friend, Calvin T. Bowles, went upon the property to find the dog, found Mrs. Wiesen walking an Irish Setter on a leash, each grabbed the leash, and all three had a tug-of-war. Finally Mr. Wiesen came to the scene and the scuffle stopped. Both Mr. Wiesen and Mrs. Wiesen told Mrs. Newcomb and Mr. Bowles to leave the property. Mrs. Newcomb identified the dog and indicated Mrs. Wiesen knew it was her [Mrs. Newcomb's]

dog (T.1-116). Mr. Bowles also made identification even though all Irish Setters look alike (T.1-186 & 188). Mrs. Wiesen obtained criminal warrants against Mrs. Newcomb for assault and trespass.

Mr. William L. Heartwell, Commonwealth's Attorney who prosecuted this case against Mrs. Wiesen also prosecuted the case against Mrs. Newcomb for trespass and assault. In calling Mrs. Wiesen as the Commonwealth's witness, he began asking her questions about her acquisition of the dog. She explained several claims had been made by Mrs. Newcomb concerning the dog and inquired of Mr. Heartwell whether she should testify. While Mrs. Wiesen knew Deputy Kelly had obtained a search warrant on June 17, 1980, she did not know she had been a suspect of the crime for stealing the dog since February 27, 1980 and did

not know a criminal warrant was contemplated against her in the next several days. Yet Mr. Heartwell, who was investigating this criminal charge against Mrs. Wiesen, told her to go forward and testify and asked numerous questions about her acquisition of the dog, completely immaterial to the charges of trespass and assault. Even though the presiding district judge may not have known Wiesen was a suspect and thus been unable to have protected her, Mr. Heartwell knew his questions were for the purpose of assisting him in the prosecution of Wiesen for the theft of the dog. Not only did he consciously fail to warn her of her privilege against self-incrimination, but he also requested Deputy Lutz to stand in the courtroom and listen so Lutz could testify to Wiesen's answers at a later date at the trial in this case. Deputy Lutz testi-

fied that when Wiesen testified at the trial against Mrs. Newcomb she said she did not know where she obtained the Irish Setter. [This is true because, unless she did steal the dog, the evidence was it appeared at her patio on February 19, 1980 and she did not know its origin.] Deputy Lutz also stated that she testified she did not know where the tatoo was on the dog's body. [There is no evidence that Mrs. Wiesen did know the precise location of the tatoo.] Yet in his closing argument , Mr. Heartwell stated that Mrs. Wiesen gave one account of the origin of the dog to Deputy Kelly on June 17, 1980 and then a second account in district court as told by Deputy Lutz (T.2-13) and then a third accounting at the trial.

Dr. Robin Waldron, a veterinarian in Troutville, Virginia, testified Mrs.

Newcomb had brought the Irish Setter dog named Brandy to him to be spayed on February 18, 1980 and a hysterectomy was performed on February 19, 1980. The ovaries and tubes were removed and could not be removed again (T.1-60). Dr. Ralph Ayers, a veterinarian from Roanoke, testified he treated a number of animals for Mr. and Mrs. Wiesen over the years. On October 29, 1980, he spayed an Irish Setter named Brandy who had the number 227-60-7037 tatooed on her (T.1-160). He did a full hysterectomy on the dog who had not been previously spayed. Thus two dogs are obviously involved and the second dog is the one with the tatoo.

In addition, Lloyd James, a building contractor constructing a new house for Mr. and Mrs. Wiesen in the Mill Creek section of the county, remembered receiving a check from Mrs. Wiesen on

Friday, February 22, 1980, and an Irish Setter was in her home at that time. (T.1-240 & 241). William J. Heath, a banker from Lexington, visited the home of Mr. and Mrs. Wiesen on either Wednesday, February 20, or Thursday, February 21, 1980 and saw the Irish Setter (T.1-247). Carroll Huffman, a television salesman, visited the Wiesen home on February 22, 1980 (T.1-253) and saw the Irish Setter dog there (T.1-255). All three of these observations were before the theft but after Mr. and Mrs. Wiesen testified the second dog wandered onto their patio.

V11. ARGUMENT

POINT NO. 1 : THE TESTIMONY BY A DEPUTY SHERIFF ABOUT STATEMENTS IN PRIOR TESTIMONY OF THE ACCUSED COMPELLED IN ANOTHER CRIMINAL PROCEEDING ON BEHALF OF THE SAME PROSECUTING ATTORNEY VIOLATES THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

On July 5, 1980, Mrs. Newcomb and Mr. Bowles went upon the land of Mr. and Mrs.

Wiesen to retrieve Mrs. Newcomb's dog allegedly in the possession of Mrs. Wiesen. Even if Wiesen had stolen the dog from Mrs. Newcomb, there were ample civil processes for Mrs. Newcomb to regain her dog. Consequently Mrs. Newcomb was criminally guilty of common law trespass by : (1) entering upon the land of Mr. and Mrs. Wiesen; (2) without authorization (3) under circumstances or in a manner so as to constitute a breach of the peace of threaten breach of the peace. *Miller v. Harless*, 153 Va. 228, 149 S. E. 619 (1929). When Mrs. Newcomb grabbed the leash of the dog in the hands of Mrs. Wiesen, the incident was a criminal assault and battery by Mrs. Newcomb against Wiesen. *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427 (1921). Mr. and Mrs. Wiesen told Mr. Bowles and Mrs.

Newcomb to leave their land and when Mr. Bowles and Mrs. Newcomb failed to do so, they were guilty of criminal statutory trespass. Va. Code § 18.2-119. Mrs. Wiesen apparently obtained criminal warrants against Mrs. Newcomb for assault and trespass; and when Mrs. Wiesen testified against Mrs. Newcomb at the trial of these charges on August 12, 1980, the issue of ownership of the dog was immaterial beyond the fact that ownership was contested. Yet the prosecuting attorney required Mrs. Wiesen to answer various questions about her acquisition of the dog and he had a deputy sheriff listen to the testimony and then testify as to Mrs. Wiesen's answers at the trial in this case. Because of the prosecuting attorney's comments in the closing argument, the testimony of this deputy sheriff was critical.

In *Malloy v. Hogan*, 378 U.S. 1 (1964), this Court held:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such silence". 378 U.S. at page 8.

In effect, the trial of Mrs. Newcomb for assault and trespass was a charade used by the prosecuting attorney to avoid the warning to Wiesen required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This violation of Wiesen's rights by the testimony of the deputy sheriff is not cured by Wiesen's subsequent testimony. Her privilege against self-incrimination was violated when she was placed in the position where she had to testify in order to avoid the adverse inferences which would result from her failure to testify to contradict prior statements

improperly attributed to her in violation of privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609 (1965).

Because of this very bold violation of the right of Wiesen guaranteed by federal constitutional law a writ of certiorari should be granted.

POINT NO. 2: THE TESTIMONY OF A DIFFERENT DEPUTY OF A FALSE ACCOUNT GIVEN BY THE ACCUSED AS TO HER ACQUISITION OF THE DOG WITHOUT A PROPER WARNING WAS INADMISSIBLE.

When Deputy Kelly obtained a search warrant for the dog on June 17, 1980, he went into the Wiesen home with two other deputies and talked to Mr. Wiesen , Mrs. Wiesen and Mr. Bartley. In particular, he asked Mrs. Wiesen to explain where she obtained the dog. Mrs. Wiesen had been his suspect since February 27, 1980 (T.1-104); and now he was asking her questions pursuant to his investigation

of her for a felony. While Mr. Wiesen called a lawyer, Mrs. Wiesen did not call a lawyer or talk to a lawyer or know what a lawyer told Mr. Wiesen. Without warning Mrs. Wiesen of the right to remain silent and right to a lawyer, Deputy Kelly told Mrs. Wiesen if she did not account for the dog, he would take the dog to the pound until its ownership was determined. She then gave a false account of her acquisition of the dog and this was the most damaging evidence against her at the trial.

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), it was held that when police investigation focused on the accused as a suspect rather than as part of the general investigation, the accused was entitled to the assistance of counsel. To clarify this ruling, this Court held in *Miranda v. Arizona, supra,*

that prior to any such questioning, the accused must be warned that she has a right to remain silent, that any statement she does make may be used as evidence against her, and that she has the right to the presence of an attorney, either retained or appointed. The accused may waive these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, the accused indicates in any manner at any stage of the process that she wishes to consult an attorney before speaking, there can be no further questions. The mere fact that she may have answered some questions or volunteered some statements on her own does not deprive her of her right to refrain from answering any further questions until she has consulted with an attorney and thereafter consents to the questions. The statements made by an accused who has not been warned violates the Fifth Amend-

ment right against self-incrimination and the Sixth Amendment right to the assistance of counsel made applicable to state criminal proceedings by virtue of the Fourteenth Amendment of the Constitution of the United States.

Here, Wiesen could not have waived her rights because she was never warned of her rights or even given a chance to waive the same. Clearly the testimony of the deputy sheriff about the false account of the acquisition of the dog was inadmissible; and because of this flagrant violation of her federally guaranteed right, a writ of certiorari should be granted.

POINT NO. 3: WHEN EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION, THE CONVICTION VIOLATES DUE PROCESS OF LAW.

Obviously two dogs are involved. On February 19, 1980, Dr. Waldron performed a hysterectomy on the female Irish Setter

named Brandy owned by Mrs. Newcomb prior to the time the dog was stolen on February 26, 1980. On October 29, 1980, Dr. Ayers performed a hysterectomy on a female Irish Setter named Brandy owned by Wiesen on which had been tatooed the number 227-60-7037. Consequently the dog with the number tatooed on it in the possession of Wiesen could not have been the stolen dog. While conceivably Wiesen could have stolen the dog, had it tatooed, and then obtained another dog and had it tatooed to avoid the investigation of a theft, a banker, building contractor and a television salesman all saw an Irish Setter dog in the possession of Wiesen prior to the theft on February 26, 1980 but after Mrs. Newcomb had obtained the return of her dog on February 18, 1980. Two neighbors of both Mrs. Wiesen and Mrs. Newcomb testi-

fied that when Mrs. Newcomb called Mr. Wiesen on February 19, 1980 to state her dog was at the veterinarian's,Mr. and Mrs. Wiesen had the second dog in their possession at the time of the telephone call and they specifically knew the first dog and consequently knew the dog in possession of Mrs. Wiesen was not the Newcomb dog which was stolen. Unless testimony of all these witnesses is completely discarded, there is no way Wiesen can be guilty of stealing the Newcomb dog. Because it is impossible for a dog to have two hysterectomies, the evidence of the theft defies generally accepted scientific principles.

Apparently the trial court considered the evidence sufficient because of the identificationsmade of the dog by Mrs. Newcomb and Jamie Newcomb on June 17, 1980; and the identifications made by Jamie Newcomb on July 5, 1980 and the

subsequent identification on that date made by Mr. Bowles and Mrs. Newcomb. The dog was a puppy when stolen. On the day of the identifications, it was a full grown dog. Identifications made on June 17th were from the Interstate Highway some distance away. The identification made by Jamie Newcomb on July 5, 1930 was while she was in an automobile traveling one direction and the dog was in a motor vehicle traveling in the opposite direction. The identifications made by Mr. Bowles and Mrs. Newcomb on July 5, 1980 were while they were fighting over the dog. Because all Irish Setter dogs look alike, none of these identifications were reliable. While admittedly an owner may know his dog even though all dogs of a breed may look alike, identifications of a full grown dog that had been stolen while a puppy made these identifications suspect. Certainly human beings would be more distinguishable

than Irish Setter dogs. Yet this Court noted in *United States v. Wade*, 338 U.S. 218 (1967) as follows:

> "The vagaries of eye witness identifications are well known; the annals of criminal law are rife with instances of mistaken identification. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These incidents are recent - not due to the brutalities of ancient criminal procedure'... A major factor contributing to the high instances of the miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents a suspect to a witness for pretrial identification". 338 U.S. at page 228.

Here there was no line-up of dogs, but a case of Mrs. Newcomb (who had already called Mr. Wiesen and said he was lying because her dog was not well kept) and her witnesses assuming a dog was the

stolen dog.

While normally this Court will not interfere with a jury verdict approved by the highest court of a state, the due process clause of the Fourteenth Amendment protects an accused against a criminal conviction except upon proof beyond a reasonable doubt as to every fact necessary to constitute the crime for which the accused is charged. *In re: Winship*, 397 U.S. 358 (1970).

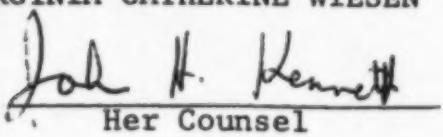
V111 CONCLUSION

By denying a writ of error, the Supreme Court of Virginia erroneously decided the federal questions of self-incrimination, right to counsel and due process of law. Accordingly the administration of justice requires this Court to grant a writ of certiorari

to review that judgment.

Respectfully submitted,

VIRGINIA CATHERINE WIESEN

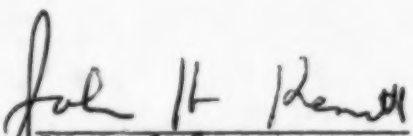
By 
Her Counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia
Counsel for Petitioner

1X PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of April, 1982, I served a true copy of the foregoing petition for a writ of certiorari on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first class mail with postage thereon prepaid addressed to William L. Heartwell, Commonwealth's Attorney,

Botetourt County Courthouse, Fincastle, Virginia and by mailing three additional copies of same in a duly addressed envelope in first class mail with postage thereon prepaid addressed to Gerald L. Baliles, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.



Counsel for
Petitioner

X APPENDIX

The appendix consists of the judgment of the Supreme Court of Virginia sought to be reviewed.

Appendix

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY, THE 2ND DAY OF MARCH, 1982.

VIRGINIA CATHERINE WIESEN,

Appellant

against Record No. 811135
Circuit Court No. F-4132

COMMONWEALTH OF VIRGINIA,

Appellee

From the Circuit Court of Botetourt County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

Mr, Justice Stephenson took no part in the consideration decision in this case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk